IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-926

GERALDINE G. CANNON, *Petitioner,*

v.

THE UNIVERSITY OF CHICAGO, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

This brief is submitted with the written consent of counsel to all parties filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes former Attorneys General, past Presidents of the American Bar Association, former Solicitors General, a number of law school deans, and many of the nation's leading lawyers. Through its

national office in Washington, D.C., and its offices in Jackson, Mississippi and eight other cities, the Lawyers' Committee over the past fifteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in education, employment, voting, housing, municipal services, the administration of justice, and law enforcement.

The Lawyers' Committee and its local committees, affiliates, and volunteer lawyers have been actively engaged in providing legal representation to those seeking relief under federal civil rights legislation. That litigation includes cases raising issues similar to those presented here. The Committee for many years has also dealt with various federal agencies, including the Department of Health, Education and Welfare, and, as a result, has a great deal of knowledge and expertise concerning the legislation the Department seeks to enforce, and the effectiveness of its efforts. Further, the Lawyers' Committee has a Federal Education Project (which is privately funded) that seeks, among its goals, to insure that Title IX of the Education Amendments of 1972 is comprehensively implemented. Our interest in this case therefore is two-fold: first, and generally, to assist citizens in having their claims for civil rights adjudicated in federal courts, whenever necessary; and second, more particularly, to insure the full recognition of individual rights under Title IX.

This case involves the claim of a private citizen that she was denied admission because of her sex to medical schools which receive federal financial assistance. Several years have passed since she was refused admittance and no court or federal agency has yet ruled on the merits of her Title IX claim. The Department

of HEW acknowledges that administrative enforcement alone of Title IX is insufficient to enforce the statute. Yet, the court of appeals ruling in this case is that there is no private right of action under Title IX. Therefore, if the court of appeals ruling is allowed to stand, private citizens, such as the petitioner, are without recourse to a timely determination of their claims of discrimination. The consequence of no timely determination will ordinarily mean the loss of the opportunity or benefit in question—here the opportunity to attend medical school.

Unless the court of appeals ruling is reversed, our efforts, particularly the efforts of our Federal Education Project, to see that the rights created by Title IX are enjoyed by all persons will be seriously undermined. In addition, unless the court of appeals ruling is reversed, the congressional recognition of the concept of "private attorneys general", often approved by this Court, would be undermined. Finally, *amicus* believes that unless the ruling is reversed, Title IX will be reduced to a pious statement, largely unenforceable. As an organization that was established to increase private efforts to end discrimination we have a vital interest in the outcome of this case, and, therefore, the Lawyers' Committee files this brief as friend of the Court urging reversal.

SUMMARY OF ARGUMENT

Title IX was enacted to assure to all persons the right to participate in federally assisted education programs without being subjected to discrimination on the basis of sex.[1] In enacting Title IX, Congress gave specific enforcement responsibilities to the Attorney Gen-

[1] Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373, 20 U.S.C. §§ 1681 *et seq.* (Supp. V 1975).

eral and to federal departments and agencies. It did not expressly authorize victims of discrimination to bring private enforcement actions. In connection with similar civil rights legislation, this Court has repeatedly recognized that private enforcement suits to vindicate personal rights are consistent with and necessary supplements to administrative enforcement. The decision of the court of appeals denying a private right of action under Title IX cannot be squared with the prior decisions of this Court.

The protection of civil rights is not a responsibility entrusted to the peculiar competence of administrative agencies but is rather one in which the courts have traditionally played a leading role. Private enforcement actions are particularly appropriate here where the administrative enforcement mechanisms do not entitle the victim of discrimination to compel investigations, to participate as a party in administrative proceedings, or to appeal adverse decisions. Moreover, the administrative finding of discrimination characteristically triggers only the cutting off of federal funds, an action which affords no relief to individual victims of discrimination. Finally, as the Department of Health, Education and Welfare ("HEW") itself concedes, practical experience with administrative enforcement has shown it to be inadequate to enforce the prohibitions of Title IX.

ARGUMENT

I. INTRODUCTION

In comprehensive language which applies, *inter alia*, to admissions to professional and graduate schools,[2]

[2] 20 U.S.C. § 1681(a)(1) (Supp. V 1975) provides that "in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education . . . ."

§ 901 of Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . . ." 20 U.S.C. § 1681 (Supp. V 1975). Petitioner Geraldine G. Cannon brought this action to enforce Title IX's prohibitions. Specifically, she alleged that respondents The University of Chicago and Northwestern University discriminated on the basis of sex in violation of her rights under Title IX when they rejected her applications for admission to medical school.[3] Neither the district court[4] nor the court of appeals[5] reached the merits of her claims, because each refused to recognize a private right of action under Title IX.[6]

[3] The complaint also alleged that petitioner's rights were violated under the Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1970); the Age Discrimination in Employment Act, § 2, 29 U.S.C. § 621 (1970); and the Public Health Services Act, § 799A, 42 U.S.C.A. § 292d (West Supp. 1974-77). Certiorari was sought only with respect to whether there is an implied private right of action under Title IX, Petition for a Writ of Certiorari 3, and was granted on July 3, 1978. 98 S.Ct. 3142 (1978).

[4] 406 F. Supp. 1257 (N.D. Ill. 1976).

[5] 559 F.2d 1063 (7th Cir. 1976), *aff'd on rehearing*, 559 F.2d 1077 (7th Cir. 1977).

[6] The court of appeals did state that "it would have been unfair to admit plaintiff to the class ahead of at least the 2000 other applicants who had better academic records". 559 F.2d at 1067 n.2. The bluntness of this statement suggests that the court's view of the merits of petitioner's case may have infected its conclusion that Title IX does not afford a private right of action. The fact that this petitioner may ultimately fail to establish unlawful discrimination is, of course, no warrant for denying her an opportunity to prove her case nor is it a justification for denying a private right of action to others who may clearly be victims of discrimination.

Thus the only issue now before this Court is whether the courts below erred in refusing to allow the victim of discrimination to bring suit.[7]

The considerations relevant to "determining whether a private remedy is implicit in a statute not expressly providing one", *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), can best be reviewed by answering the four questions posed in *Cort:*

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff?
>
> * * *
>
> Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
>
> * * *
>
> Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?
>
> * * *
>
> And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? 422 U.S. at 78 (citations omitted).

[7] If private actions are authorized to enforce the prohibitions of Title IX, district courts have jurisdiction to hear them under 28 U.S.C. § 1343(4), which establishes jurisdiction over civil actions "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." *Jones* v. *The American University, et al.*, CA No. 78-565, slip op. at 6 (D.D.C., July 27, 1978). *Cf. Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 412 n.1 (1968) (Civil Rights Act of 1866); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 554 (1969) (Voting Rights Act of 1965). *See also* 1 Moore's Federal Practice ¶ 0.62[9], at 700.21 (2d ed. 1977) (Title VI of the Civil Rights Act of 1964).

Amicus submits that the answers to those questions[8] confirm that Title IX is precisely the sort of statute which should give rise to a private right of action.[9]

II. TITLE IX CREATES A FEDERAL RIGHT TO EQUAL EDUCATIONAL OPPORTUNITIES IN FAVOR OF PETITIONER

The legislative history of Title IX makes clear that it was intended to protect those who had been or might be subjected to sex discrimination in federally assisted programs of higher education.

[8] A private enforcement action under Title IX is manifestly not a cause of action "traditionally relegated to state law", *Cort* v. *Ash*, 422 U.S. at 78, both because Title IX extends only to programs supported by federal funding and because the federal government historically has undertaken the principal responsibility for combatting discrimination. *Cf. Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976) (sustaining, over an Eleventh Amendment challenge, the award of a "reasonable attorney's fee" pursuant to 42 U.S.C. 2000e-5(k) against a state found to have engaged in employment discrimination on the basis of sex).

[9] Several lower courts have sanctioned private enforcement actions under Title IX itself. *Jones* v. *The American University, et al.*, CA No. 78-565 (D.D.C. July 27, 1978) (Oberdorfer, J.) (denying motion to dismiss claim by female student of multiple discriminatory acts); *Piascik* v. *Cleveland Museum of Art*, 426 F. S pp. 779 n.1 (N.D. Ohio 1976) (expressly recognizing private righ of action under Title IX where female job applicant alleged discrimination in refusal to hire); *Trent* v. *Perritt*, 391 F. Supp. 171 (S.D. Miss. 1975) (implicitly recognizing private right of action where male public school student was permitted to argue that hair length code discriminated against him in violation of Title IX); *Alexander* v. *Yale University*, No. N-77-277 (D. Conn. Dec. 21, 1977) (denying motion to dismiss claim by female students alleging sexual harassment by male faculty members in violation of Title IX); *Grossman* v. *Texas Tech Union*, No. CA-5-77-23 (N.D. Tex. Nov. 18, 1977) (denying motion to dismiss private action under Titles VI and IX).

In introducing Title IX in the Senate, Senator Bayh stated that "we are attempting to establish access to higher education as a basic Federal right." 117 Cong. Rec. 30155 (1971). Much of the debate focused on admissions because "the area where discrimination affects the greatest number of women is in admissions ...." 118 Cong. Rec. 5805 (1972) (remarks of Senator Bayh). Medical school admissions policies were particularly and frequently cited as among the most discriminatory against women. *See, e.g.,* 117 Cong. Rec. 30406 (1971); 117 Cong. Rec. 39248-61 (1971) (debate and passage of the Erlenborn Amendment allowing private undergraduate schools to discriminate in admission).

In short, Title IX was intended to and does confer on medical school applicants such as petitioner a federal right to be considered for admission without discrimination on the basis of sex.

III. IMPLICATION OF A PRIVATE RIGHT OF ACTION UNDER TITLE IX IS CONSISTENT WITH CONGRESSIONAL INTENT

The court below held that implication of a private right of action would be inconsistent with the legislative intent underlying Title IX. 559 F.2d at 1080. In reaching this result, the court both misconstrued the legislative history of Title IX and misapplied the intent criterion of *Cort* to the legislative history.

The legislative history of Title IX contains no expression of support for or opposition to private rights of action, and thus no definitive understanding of congressional intent is possible. However, a brief review of related statutes demonstrates that a private right of action under Title IX is at least consistent with congressional intent.

The prohibitory language and the remedies of Title IX were patterned explicitly on those of Title VI of the Civil Rights Act of 1964.[10] When Title IX was enacted in 1972, several courts had recognized implied private rights of action under Title VI.[11] As the court below acknowledged, the legislative history of Title IX gives no indication that Congress intended either to overturn or to adopt this line of cases in connection with Title IX.[12]

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[10] *See, e.g.*, comments of Senator Bayh in support of Title IX:

> Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by Title VI of the Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibitions and enforcement provisions which generally parallel the provisions of Title VI. 118 Cong. Rec. 5807 (1972).

[11] *E.g., Bossier Parish School Bd.* v. *Lemon*, 370 F.2d 847 (5th Cir. 1967), *cert. den.*, 388 U.S. 911; *Gautreaux* v. *Chicago Housing Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967). The court below distinguished this line of cases by stating that the decisions do not affirmatively establish the existence of an implied private right of action under Title VI. Commenting on *Bossier* in particular, the court said:

> We suspect that even the cases that do not expressly mention Section 1983 were in fact brought under that statute, for all the cases cited to us appear to have been brought against public agencies acting under color of state law. 559 F.2d at 1082 n.6.

Yet, the court in *Bossier* specifically held:

> Consequently, plaintiffs are entitled to bring this class action *either* under Section 601 of the Civil Rights Act of 1964 *or* under the contractual assurances by which the defendants are estopped to deny them the same rights to attend desegregated schools as are possessed by children of Negro residents of Bossier Parish. 370 F.2d at 851 (emphasis added).

Thus, the Fifth Circuit seems clearly to have recognized a private right of action under Title VI.

[12] 559 F.2d at 1082.

By 1976, when Congress enacted the Civil Rights Attorney's Fees Award Act ("Attorney's Fees Act"),[13] it was fully aware of the progress of litigation concerning private actions under Titles VI and IX. For example, Senator Scott stated in support of the Attorney's Fees Act:

> Each of the provisions covered by S. 2278 relies upon private enforcement . . . . Congress should encourage citizens to go to court in private suits to vindicate its policies and protect their rights.
>
> . . . .
>
> The enactment of S. 2278 is needed to assure that attorney's fees will be available in suits brought under the reconstruction-era civil rights laws, title VI of the 1964 Civil Rights Act, and title IX of the Education Amendments of 1972 in the same fashion and to the same extent as the statutes presently provide in cases brought under title VI of the 1964 Civil Rights Act. Mr. President, as a nation of laws, and as a government of laws, we should welcome citizen suits which succeed in enforcing laws. 122 Cong. Rec. S 16251 (daily ed. Sept. 21, 1976).

Other Members of Congress, however, took pains to avoid any implication that the Attorney's Fees Act was intended to alter the course of pending litigation:

> It has been brought to my attention that by granting attorneys' fees to prevailing parties other than the United States, Congress might implicitly authorize a private right of action under title VI and title IX. This is not the intent of Congress. This bill merely creates a remedy in the event the courts determine that an individual may sue under these statutes. 122 Cong. Rec. H 12161 (daily ed. Oct. 1, 1976) (comments of Rep. Railsback).

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[13] P.L. 94-559, 90 Stat. 2641, 42 U.S.C.A. § 1988 (West Supp. 1974-77).

The court of appeals assigned a mistaken significance to the substantially silent legislative history of Title IX and to the studied neutrality reflected in the deliberations surrounding the Attorney's Fees Act. *Cort* instructs not that private rights of action must be denied unless Congress affirmatively prescribes them—in such a case *Cort's* analytical framework would be superfluous—but rather that courts satisfy themselves that Congress did not intend to preclude private causes of action:

> [I]n situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling. 422 U.S. at 82.

The legislative history of Title IX satisfies this criterion. While it may not demonstrate an affirmative intent to create private rights of action, at the very least it demonstrates that Congress did not intend to deny such rights, which is all that *Cort* requires.

IV. A PRIVATE RIGHT OF ACTION WOULD SERVE THE UNDERLYING PURPOSE OF TITLE IX

The inconclusive evidence regarding congressional intent to grant a private right of action makes critical the question whether private actions would serve or disserve the overall purpose of Title IX—to ensure that applicants to medical schools, among others, are accorded fair treatment without discrimination on the basis of sex. Yet the court of appeals wholly failed to address the relationship of private actions to that purpose. Instead the court below appears to have relied on the mere existence of an administrative enforcement

mechanism as a basis for refusing to allow private actions.[14] This wooden approach has been rejected by this Court, which has regularly allowed private actions as supplements to administrative enforcement when such actions would serve the underlying purposes of the legislation. In the present case, careful review of the purpose of Title IX and of its administrative enforcement mechanism demonstrates that private enforcement actions would contribute importantly to eliminating sex discrimination from federally assisted education programs.

A. A Private Right of Action Is Appropriate to Vindicate Civil Rights Such as Those Created by Title IX

Title IX establishes a strong personal right against discriminatory treatment, in the tradition of federal legislation barring discrimination in voting, employment, housing and other significant areas. Decisions of this Court and the lower federal courts have recognized the important role played by private enforcement actions in translating broad statutory prohibitions into meaningful protection for individuals.[15] When Congress has created such rights "[i]t is for federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded". *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 433 (1964), *quoting Bell* v. *Hood,* 327 U.S. 678, 684 (1946).

In *Steele* v. *Louisville & N.R.R.,* 323 U.S. 192 (1944), the Court held that black railroad firemen may seek

[14] 559 F.2d at 1073-74.

[15] *See* Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View,* 87 Yale L.J. 1378 (1978).

injunctive relief against an agreement between the railroad and their union, which together had discriminated against the firemen. Since the Railway Labor Act, 48 Stat. 1185, 45 U.S.C. §§ 151 *et seq.,* provided that only the union could bring complaints before the Railroad Adjustment Board, the firemen were left without a mechanism to vindicate their right to fair representation. "That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction." 323 U.S. at 207. *See also Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U.S. 210 (1944).

The same concern led the Court in *Allen* v. *State Bd. of Elections,* 393 U.S. 544 (1969), to recognize a private right of action to enforce § 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. §§ 1973 *et seq.* While the Voting Rights Act, like Title IX, did "not explicitly grant or deny private parties authorization" to bring private actions, 393 U.S. at 554, it provided that "no person shall be denied the right to vote" for failure to comply with state or local voting laws not yet approved by the Attorney General or the federal district court for the District of Columbia. 393 U.S. at 555. The Court held that the guarantee of § 5 "might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." 393 U.S. at 557.[16]

[16] This philosophy was also expressed in a different context in *Rosado* v. *Wyman,* 397 U.S. 397 (1970), which held that welfare recipients could bring private actions to challenge state welfare plans as violative of § 402(a)(23) of the Social Security Amendments of 1967, 42 U.S.C. § 602(a)(23) (1970). The Court there stated that "[w]e are most reluctant to assume Congress has

In *Lau* v. *Nichols,* 414 U.S. 563 (1974), the Court held that the failure of the San Francisco school system to provide English language instruction for Chinese-speaking students violated Title VI of the Civil Rights Act of 1964, which bars discrimination "on the ground of race, color, or national origin" in federally funded activities. 42 U.S.C. § 2000d (1970). By deciding the merits of the case in favor of the students, the Court must necessarily have concluded that they were entitled to bring such a private enforcement action.[17]

That *Lau* recognized a private right of action under Title VI was confirmed in *The Regents of The University of California* v. *Bakke,* 98 S.Ct. 2733 (1978), in which four Justices concluded that Title VI affords a private right of action. 98 S.Ct. at 2814-5 (Opinion of Justice Stevens, concurring in the judgment in part and dissenting in part). Four other members of the Court assumed for the purposes of the case that Title VI affords a private right of action. 98 S.Ct. at 2745 (Opinion of Justice Powell); 98 S.Ct. at 2768 (Opinion of Justice Brennan, concurring in the judgment in

closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." 397 U.S. at 420.

[17] Justice Blackmun, in concurrence, noted that the case involved 1,800 students and recorded his view that, in a case involving only one or a very few students, he "would not regard today's decision, or the separate concurrence, as conclusive upon the issue of whether the statute and the guidelines require the funded school district to provide special instruction." 414 U.S. at 572. Justice Blackmun's language makes it plain that his reservation was addressed to the standards for determining discrimination and to the appropriate relief after a finding of discrimination, and not, as the court of appeals concluded, 559 F.2d at 1072, to whether one or a few students could bring a private enforcement action.

part and dissenting). The Opinion of Justice Stevens analyzed Title VI in detail and observed that:

> The analogy to the Voting Rights Act of 1965, 79 Stat. 437, is clear. Both that Act and Title VI are broadly phrased in terms of personal rights ("no person shall be denied . . ."); both Acts were drafted with broad remedial purposes in mind; and the effectiveness of both Acts would be "severely hampered" without the existence of a private remedy to supplement administrative procedures. 98 S.Ct. at 2815 n.28.

Title IX creates personal rights against discrimination closely analogous to those created by § 5 and Title VI.[18] The unequivocal language of § 901 bears repeating: "No person in the United States shall, on the basis

[18] Private rights of action have been implied under several other statutes conferring personal rights. *Fitzgerald* v. *Pan American World Airways, Inc.,* 229 F.2d 499 (2d Cir. 1956) (implying a private right of action under 49 U.S.C. § 484(b), a provision of the Civil Aeronautics Act prohibiting air carriers from discriminating unjustly); *Bossier Parish School Board* v. *Lemon,* 370 F.2d 847 (5th Cir. 1967) (discussed in note 11, *supra*).

The courts have also implied a private right of action under Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. § 794 (Supp. V 1975), which prohibits discrimination against otherwise qualified handicapped persons. It was modelled after Title VI and Title IX:

> Section 504 is patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964 . . . and section 901 of the Education Amendments of 1972. 1974 U.S. Code Cong. & Admin. News 6390.

In *Lloyd* v. *Regional Transp. Auth.,* 548 F.2d 1277 (7th Cir. 1977), two "mobility-disabled" individuals on behalf of a class of all such persons in northeastern Illinois sued two mass transportation systems alleging that they were unable to use defendants' systems. Noting that Section 504 closely tracks the language of Title VI, the court implied a private right of action under Section 504 on the authority of *Lau* v. *Nichols, supra.* 548 F.2d at 1280. *Amicus* does not believe that the lower court's purported distinc-

of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" any federally assisted education program. The legislative purpose to protect *persons* from discrimination would be served by allowing private rights of action under Title IX.

In contrast, private actions would not have served statutory purposes or would have served one purpose only at the expense of another in the cases which have declined to recognize private rights of action. *Cort* v. *Ash, supra,* held that a shareholder could not bring a derivative suit to recover corporate funds illegally used in a federal election, because "the existence or nonexistence of a derivative cause of action for damages would not aid or hinder [the legislation's] primary goal [of reducing the impact of corporate funds on federal elections]." 422 U.S. at 85. *Piper* v. *Chris Craft Industries, Inc.,* 430 U.S. 1 (1977), held that to imply a private right of action in favor of unsuccessful tender offerors could not serve the objectives of the Williams Act, because the "sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer." 430 U.S. at 35.

Santa Clara Pueblo v. *Martinez,* 98 S.Ct. 1670 (1978), concerned an allegation under Title I of the

tion of *Lloyd* can be sustained in the face of the demonstrated inadequacy of HEW's efforts to enforce Title IX.

This Court also implicitly recognized a private right of action under Section 504 in *Campbell* v. *Kruse,* 434 U.S. 808 (1977). In *Campbell,* handicapped children and their parents challenged Virginia statutes which allegedly discriminated by not providing public school services to such children on the same basis as other children. A three judge court held for the plaintiffs on equal protection grounds. 431 F. Supp. 180 (E.D. Va. 1977). On appeal, the Court vacated and remanded with express directions to the district court to decide the claim based on section 504.

Indian Civil Rights Act of 1968 ("ICRA")[19] that tribal authorities had discriminated on the basis of sex in determining membership in the tribe. The Court, through Justice Marshall, refused to recognize a private right of action because it would constitute a judicial intrusion into tribal sovereignty, which takes precedence if Congress has not expressly granted a private right of action. Noting that "we have frequently recognized the propriety of inferring a federal cause of action for the enforcement of civil rights, even when Congress has spoken in purely declarative terms", 98 S.Ct. at 1678, the Court contrasted the single purpose of most civil rights statutes with the dual purpose of the ICRA and concluded that:

> [w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other. 98 S.Ct. at 1680.[20]

In contrast, Title IX has the clear, unitary purpose of prohibiting discrimination on the basis of sex, a purpose which private enforcement actions would serve.

[19] 25 U.S.C. §§ 1301-03 (1970).

[20] *Brown* v. *General Services Administration,* 425 U.S. 820 (1976), upon which the university respondents rely, Opposition to Petition for Writ of Certiorari 7, concerned Section 717 of the Civil Rights Act of 1964. Section 717 provides that an aggrieved federal employee may file an administrative complaint alleging discrimination and, after an adverse administrative decision, may file a complaint in federal district court within thirty days. The court properly held that a tardy plaintiff could not circumvent the thirty-day limitation through "artful pleading" of an implied private right of action different from the private right of action delineated by Congress. *Brown* thus is not instructive with respect to Title IX, in which Congress did not specify the terms and conditions of a private right of action.

B. A Private Right of Action Would Complement Inadequate Administrative Enforcement

In both design and performance, administrative enforcement falls far short of honoring § 901's guarantees. Title IX directs each department or agency "which is empowered to extend Federal financial assistance to any education program or activity . . . to effectuate the provisions of [§ 901] with respect to such program or activity by issuing rules . . . ." 20 U.S.C. § 1682 (Supp. V 1975). If a recipient of federal assistance violates such a rule, the department may, after a hearing, terminate or refuse to grant or continue assistance or may use "any other means authorized by law . . ." to secure compliance. *Id.* However, the department may not act before determining that "compliance cannot be secured by voluntary means", *id.*, and any person aggrieved by the termination of funding may obtain judicial review. 20 U.S.C. § 1683 (Supp. V 1975).

Under regulations issued by HEW,[21] which provides financial assistance to the medical schools of respondent universities, a person who feels that he or she has been subjected to discrimination may file a complaint with HEW.[22] If HEW's Office for Civil Rights investigates and finds discriminatory practices which the

[21] HEW regulations implementing Title IX are set forth at 45 C.F.R. Part 86 (1976). HEW's procedures for enforcing Title VI of the Civil Rights Act of 1964, set forth at 45 C.F.R. §§ 80.6-80.11 and 45 C.F.R. Part 81, are incorporated by reference in 45 C.F.R. § 86.71 as the procedures applicable to Title IX. Additional references in this brief to HEW's procedures will be cited directly to the Title VI provisions.

[22] 45 C.F.R. § 80.7(b) (1976).

recipient refuses to correct, the recipient is entitled to an administrative hearing[23] and, in the event of an adverse determination, to judicial review.[24]

The deficiencies of this administrative procedure as a means of vindicating the complainant's § 901 rights are striking. Except upon an extraordinary showing of agency abdication,[25] the complainant may not compel an investigation by the Office for Civil Rights and has no mechanism to appeal a decision by that Office not to investigate.[26] If an administrative hearing is convened after an investigation, the complainant is not a party to the proceeding,[27] and his or her participation as *amicus curiae* is subject to the discretion of the presiding officer.[28] Even as *amicus curiae*, the complainant has no right to introduce evidence[29] and may only request that questions be asked by the presiding officer, who may in his discretion grant the request only if the additional testimony "will not expand the issues".[30] Even if the recipient is ultimately adjudged to have engaged in discrimination on the basis of sex, the remedy imposed may not make the victim of discrimination

[23] 45 C.F.R. § 80.8(c) (1976).

[24] 45 C.F.R. § 80.11 (1976).

[25] *Adams* v. *Richardson*, 480 F.2d 1159, 1163 (D.C. Cir. 1973) ("A consistent failure to [enforce Title VI] is a dereliction of duty reviewable in the courts.").

[26] *See generally* 45 C.F.R. § 80.8 (1976).

[27] 45 C.F.R. § 81.23 (1976).

[28] 45 C.F.R. § 81.22(a) (1976).

[29] 45 C.F.R. § 81.22(a) (1976).

[30] 45 C.F.R. § 81.22(c) (1976).

whole, either because the hearing did not adjudicate the particular facts of which the individual complained or because the educational institution chooses to accept the termination of federal funds rather than reform its practices.

The administrative enforcement of Title IX is as faulty in practice as it is in theory. HEW has admitted its failure to enforce Title IX's guarantees.[31] Although Title IX was enacted more than six years ago, no federal funding has been terminated as a result of a Title IX violation and HEW has initiated only four administrative enforcement proceedings. The Fiscal Year 1979 Annual Operating Plan of the Office for Civil Rights predicts a backlog of 3,570 civil rights complaints on October 1, 1978, including 889 which involve allegations of sex discrimination.[32] Moreover, the Attorney General has *never* instituted an action to enforce Title IX.[33] In holding that a private right of action is a "useful, and perhaps a necessary, complement" to administrative enforcement, one court recog-

[31] Deposition of David Tatel, Director, Office for Civil Rights, taken on June 1, 1977, and filed in *Women's Equity Action League, et al.* v. *Califano,* C.A. No. 74-1720 (D.D.C.), at 38.

[32] 43 Fed. Reg. 39262 (Aug. 18, 1978). The ineffectiveness of HEW's enforcement efforts is detailed in Sheldon & Berndt, *Sex Discrimination in Vocational Education: Title IX and Other Remedies,* 62 Calif. L. Rev. 1121, 1153-54 (1974). *See also* Comment, 49 Temple L. Rev. 207, 221-11 (1975).

[33] Indeed, Title IX says nothing about the authority of the Attorney General to bring suit against private universities. Title IX amended the Civil Rights Act of 1964 to provide only that the Attorney General, upon complaint by an aggrieved student or parent, may institute civil actions against school boards and public colleges, 42 U.S.C. § 2000c-6 (Supp. V 1975), to remedy certain types of sex discrimination.

nized "the responsible agencies' present inability to effect fully the remedial purposes of the Act through administrative enforcement alone." *Jones* v. *The American University et al.,* CA No. 78-565, slip op. at 6 (D.D.C. July 27, 1978).

In short, administrative enforcement affords no meaningful protection to individuals. If the promise of § 901 is to be fulfilled for its intended beneficiaries, those beneficiaries must be afforded a private right of action. Finally, the Solicitor General, on behalf of HEW, supports such a private right of action as a complement to administrative enforcement which "would greatly encourage voluntary compliance with the statute's ban on sex discrimination. . . ." Brief for the Federal Respondents 14.[34]

[34] *See Allen* v. *State Bd. of Elections,* 393 U.S. 544, 557 n.23 (1969) ("It is significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits.").

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the judgment of the court of appeals should be reversed and the case remanded for trial on the merits.

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Respectfully submitted,

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